53rd GRADUATE COURSE

IMPROPER SUPERIOR-SUBORDINATE RELATIONSHIPS & FRATERNIZATION

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Outline of Instruction

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A. Army References.

1. Dep't of Army, Reg. 600-20, Personnel--General: Army Command Policy (13 May 2002)[hereinafter AR 600-20], implementing Message, 020804Z Mar 99, Headquarters, Dep't of Army, DAPE-HR-L, subject: Revised Policy on Relationships Between Soldiers of Different Ranks (2 Mar. 1999)[hereinafter DA Message].

2. Manual for Courts-Martial, United States [hereinafter MCM].

3. Former Dep't of Army, Pam. 600-35, Personnel--General: Relationships Between Soldiers of Different Rank (7 Dec 1993).

4. Dep't of Army, Pam. 600-35, Personnel--General: Relationships Between Soldiers of Different Rank (21 Feb 2001).

B. Navy, Marine Corps, and Air Force References.

1. U.S. Navy Regulations, 1990, Article 1165 - Fraternization Prohibited (as amended 25 Jan 1993).

2. OPNAVINST 5370.2B, Navy Fraternization Policy (27 May 1999).

3. Marine Corps Manual 1100.4 (as amended by HQMC, ALMAR 185/96, 130800Z May 96, subject: Marine Corps Manual (MCM) Change 3).

4. Department of Air Force Instruction 36-2909, Personnel: Professional and Unprofessional Relationships (1 May 1999).

II. INTRODUCTION.

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1. Improper Superior – Subordinate Relationships.

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III. IMPROPER SUPERIOR - SUBORDINATE RELATIONSHIPS.

A. **History**:

1. Task Force found disparate treatment between Services.

2. New policy announced by Secretary Cohen on 29 Jul 98.

3. Not effective immediately; gave Services 30 days to provide draft new policies to DoD. Essence of guidance now included within AR 600-20, paras 4-14 through 4-16.

4. Does NOT cover all senior / subordinate relationships.

5. Directs Service Secretaries to prohibit by policy:

a. Personal relationships, such as dating, sharing living accommodations, engaging in intimate or sexual relations, business enterprises, commercial solicitations, gambling and borrowing between officer and enlisted regardless of their Service; and

b. Personal relationships between recruiter and recruit, as well as between permanent party personnel and trainees.

B. **The Old Army Policy**. Previous AR 600-20 (30 Mar 88), para 4-14. Two Part Analysis:

1. Part One: "Army policy does not hold dating or most other relationships between soldiers [of different ranks] as improper, barring the adverse effects listed in AR 600-20." Old DA Pam 600-35, Para. 1-5(e). Therefore, Army policy did not prohibit dating (even between officers and enlisted soldiers), *per se*.

2. Part Two:

a. "Relationships between soldiers of different rank that involve, or give the appearance of, partiality, preferential treatment, or the improper use of rank or position for personal gain, are prejudicial to good order, discipline, and high unit morale. It is Army policy that such relationships will be avoided." Old AR 600-20, paragraph 4-14.

b. "Commanders and supervisors will counsel those involved or take other action, as appropriate, if relationships between soldiers of different rank --

(1) Cause actual or perceived partiality or unfairness.

(2) Involve the improper use of rank or position for personal gain.

(3) Create an actual or clearly predictable adverse impact on discipline, authority or morale." Old AR 600-20, para 4-14a.

Key Note: Old AR 600-20 was not a punitive regulation. The revised paragraphs ARE PUNITIVE.

C. **The Current Army Policy**. Changes to AR 600-20, paras 4-14, 4-15 and 4-16.

1. Now a **THREE** Part Analysis:

a. Part 1: Is this a "strictly prohibited" category?

b. Part 2: If not, are there any adverse effects?

c. Part 3: If not "strictly prohibited" and there are no adverse effects, then the relationship is not prohibited.

2. Para 4-14: Relationships between military members of different rank.

a. "Officer" includes commissioned and warrant officers.

b. Applies to relationships between soldiers, and between soldiers and members of other services.

c. Is gender-neutral.

d. (THIS IS PARA 4-14b.) The following relationships between servicemembers of **different ranks** are prohibited:

(1) Relationships that compromise or appear to compromise the integrity of supervisory authority or the chain of command;

(2) Relationships that cause actual or perceived partiality or unfairness;

(3) Relationships that involve or appear to involve the improper use or rank or position for personal gain;

(4) Relationships that are, or are perceived to be, exploitative or coercive in nature; and

(5) Relationships that cause an actual or clearly predictable adverse impact on discipline, authority, morale, or the ability of the command to accomplish its mission.

NOTE: Subparagraphs (1) and (4) are new additions to the three adverse effects looked for under the old policy's analysis.

e. (THIS IS PARA 4-14c.) Certain types of personal relationships between **officers and enlisted** personnel are prohibited. Prohibited relationships include:

(1) Ongoing business relationships (including borrowing or lending money, commercial solicitations and any other on-going financial or business relationships), **except**:

(a) Landlord / tenant; and

(b) One time transactions (such as car or home sales).

(c) All ongoing business relationships existing on the effective date of this prohibition, that were otherwise in compliance with the former policy, will not be prohibited until 1 Mar 00 (“grace period”).

(d) This prohibition does not apply to USAR / ARNG soldiers when the ongoing business relationship is due to the soldiers' civilian occupation or employment.

(2) Personal relationships, such as dating, shared living accommodations (other than as directed by operational requirements), and intimate or sexual relationships.

(a) This prohibition does not affect marriages (change as of 13 May 2002)

(b) Otherwise prohibited relationships (dating, shared living accommodations [other than directed by operational requirements] and intimate or sexual relationships), existing on the effective date of this prohibition, that were not prohibited under prior policy, are not prohibited until 1 Mar 00.

(c) Relationships otherwise in compliance with this policy **will not** become prohibited under this policy solely because of the change in status of one party to the relationship (such as commissioning). While not expressed in the policy, this provision is NOT intended to allow continued officer / enlisted dating after the close of the grandfather period.

(d) RC/RC exclusion when the personal relationship is primarily due to civilian acquaintanceship, unless on AD or FTNGD other than AT.

(e) AD/RC exclusion when the personal relationship is primarily due to civilian association, unless on AD or FTNGD other than AT.

(3) Gambling. NO EXCEPTIONS.

(4) This subparagraph is not intended to preclude normal team-building associations between soldiers, which occur in the context of activities such as community organizations, religious activities, family gatherings, unit social functions or athletic teams or events.

(5) All soldiers bear responsibility for maintaining appropriate relationships between military members. The senior military member is usually in the best position to terminate or limit relationships that may be in violation of this paragraph, but all soldiers involved may be held accountable for relationships in violation of this paragraph.

3. Para 4-15: Other Prohibited Relationships.

a. Trainee / Soldier. Any relationship between IET trainees and permanent party soldiers (not defined) not required by the training mission will be prohibited. This prohibition would apply regardless of the unit of assignment of either the permanent party soldier or the trainee.

b. Recruit / Recruiter. Any relationship between a permanent party soldier assigned or attached to USAREC, and potential prospects, applicants, members of the Delayed Entry Program or members of the Delayed Training Program, not required by the recruiting mission, will be prohibited. The prohibition would apply regardless of the unit of assignment or attachment of the parties involved.

4. Para 4-16: Paragraphs 4-14b. 4-14c and 4-15 are punitive. Violations could be punished as violations of Article 92, UCMJ.

D. **Commander's Analysis**: How does the commander determine what's improper?

1. JAs must cultivate the idea that commanders should consult with OSJA.

2. Use common sense. "The leader must be counted on to use good judgment, experience, and discretion. . . ."

3. Keep an open mind. Don't prejudge every male/female relationship. Relationships between males of different rank or between females of different rank can be as inappropriate as male/female relations. "[J]udge the results of the relationships and not the relationships themselves." DA Pam 600-35.

4. Additional scrutiny should be given to relationships involving (1) direct command/supervisory authority, or (2) power to influence personnel or disciplinary actions. "[A]uthority or influence . . . is central to any discussion of

the propriety of a particular relationship." DA Pam 600-35. These relationships are most likely to generate adverse effects.

5. Be wary that **appearances of impropriety** can be as damaging to morale and discipline as actual wrongdoing.

E. **Command Response.**

1. The commander has a wide range of responses available to him and should use the one that will achieve a result that is "warranted, appropriate, and fair." Counseling the soldiers concerned is usually the most appropriate initial action, particularly when only the potential for an appearance of actual preference or partiality, or an appearance without any adverse impact on morale, discipline or authority exists.

2. Adverse Administrative Actions: Order to terminate, relief, re-assign, bar to re-enlistment, reprimand, adverse OER/NCOER, administrative separation.

3. Criminal Sanctions: Fraternization, disobey lawful order, conduct unbecoming, adultery.

F. **Commander's Role.**

1. Commanders should seek to prevent inappropriate or unprofessional relationships through proper training and leadership by example. AR 600-20, para. 4-14(f).

2. Don't be gun-shy. Mentoring, coaching, and teaching of soldiers by their seniors should not be inhibited by gender prejudices. Old AR 600-20, para. 4-14 (e)(1).

3. Training. DA Pam 600-35.

IV. FRATERNIZATION AND RELATED OFFENSES.

A. General.

1. Fraternization is easier to describe than define.

2. There is no stereotypical case. Examples include sexual relations, drinking, and gambling buddies.

B. Fraternization. UCMJ art. 134.

1. The President has expressly forbidden officers from fraternizing on terms of military equality with enlisted personnel. MCM, pt. IV, ¶ 83b.

2. Elements: the accused

a. was a commissioned or warrant officer;

b. fraternized on terms of military equality with one or more certain enlisted member(s) in a certain manner;

c. knew the person(s) to be (an) enlisted member(s); and

d. such fraternization violated the custom of the accused's service that officers shall not fraternize with enlisted members on terms of military equality; and

e. under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.

3. "Hard to define it, but I know it when I see it."

4. Article 134 has also been successfully used to prosecute instances of officer-officer fraternization, *United States v. Callaway*, 21 M.J. 770 (A.C.M.R. 1986), and even enlisted-enlisted relationships. *United States v. Clarke*, 25 M.J. 631 (A.C.M.R. 1987), *aff'd*, 27 M.J. 361 (C.M.A. 1989).

5. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 83e.

6. Custom.

   a. The gist of this offense is a violation of the custom of the armed forces against fraternization; it does not prohibit all contact or association between officers and enlisted persons.

   b. Customs vary from service to service, and may change over time.

   c. Custom of the service must be proven through the testimony of a knowledgeable witness. *United States v. Wales*, 31 M.J. 301 (C.M.A. 1990).

7. Factors to Consider in Deciding How to Dispose of an Offense.

   a. Nature of the military relationship;

   b. Nature of the association;

   c. Number of witnesses;

   d. Likely effect on witnesses.

C. Failure to Obey Lawful General Order or Regulation. UCMJ art. 92.

1. Elements. MCM, pt. IV, ¶ 16b(1).

a. There was in effect a certain lawful general order or regulation;

b. the accused had a duty to obey it; and

c. the accused violated or failed to obey the order or regulation.

2. Maximum punishment: dismissal/dishonorable discharge, total forfeitures and two years confinement. MCM, pt. IV, ¶ 16e(1).

3. Applications.

a. Applicable to officers and enlisted.

b. Most effective when used to charge violations of local punitive general regulations (for example, regulations prohibiting improper relationships between trainees and drill sergeants).

4. **Remember:** AR 600-20 re: improper relationships is NOW a punitive regulation.

D. Conduct Unbecoming an Officer. UCMJ art. 133.

1. Elements.

a. Accused did or omitted to do certain acts; and

b. That, under the circumstances, the acts or omissions constituted conduct unbecoming an officer and gentleman.

2. Only commissioned officers and commissioned warrant officers may be charged under article 133. Maximum punishment: dismissal, total forfeitures and confinement for a period not in excess of that authorized for the most analogous offense for which punishment is prescribed in the Manual, e.g., two years for fraternization.

E. Sexual Harassment.

1. Charged under Article 93 as Cruelty and Maltreatment.

2. Other offenses may be possible given the facts and circumstances of the case such as extortion, bribery, adultery, indecent acts or assault, communicating a threat, conduct unbecoming, conduct prejudicial to good order/discipline.

V. CASE LAW

United States v. Fuller, 54 M.J. 107 (2000). Appellant was convicted of numerous offenses stemming from his sexual relations with subordinate female members of his unit. The CAAF granted review on the issue of whether the evidence was legally sufficient to sustain a conviction for cruelty and maltreatment of one of the victims. The evidence showed that while assigned to an inprocessing unit where the appellant was her platoon sergeant, the victim voluntarily went to the appellant's apartment with a friend, drank 10-12 oz. of liquor, kissed appellant, and got undressed and engaged in repeated sexual intercourse with appellant and another platoon sergeant. Additionally, the victim stated that in her decision to have sexual intercourse with the appellant, she never felt influenced by his rank and that he never threatened her or her career. Finally, the CAAF concluded that the evidence did not support a finding that the victim showed any visible signs of intoxication prior to the sexual intercourse with appellant. Although the CAAF found that the evidence was not legally sufficient to sustain a conviction for cruelty and maltreatment, they did find that it supported a conviction for the lesser-included offense of a simple disorder in violation of Article 134, UCMJ, since the appellant's conduct was prejudicial to good order and discipline or service discrediting. In mentioning that "appellant's actions clearly would support a conviction for violation the Army's prohibition against improper relationships between superiors and subordinates…", the CAAF cited to

the current version of Army Regulation 600-20 (15 Aug[sic] 1999). The court, however, did not address the fact that the appellant's conduct occurred in 1996, when the regulation was not punitive and that therefore he could not have been found guilty for failure to obey a general regulation under Article 92, UCMJ.

United States v. Brown, 55 M.J. 375 (2001). ISSUES: The CAAF considered the issues, inter ala, of: 1) whether the trial court erred by admitting the Air Force's pamphlet on discrimination and sexual harassment for the members to consider on findings and sentencing; and 2) whether the charges of conduct unbecoming an officer were supported by legally sufficient evidence. FACTS: The appellant, a captain and an Air Force nurse, was convicted of conduct unbecoming an officer for his comments to and physical contact with three co-workers over a ten month period. Appellant was married, had one child, and had served nearly ten years on active duty. All victims were female and, like the appellant, were company grade officers and Air Force nurses. All the victims worked in the operating room with the appellant at some point. The physical contact for which appellant was convicted included placing his hand on the other nurses' hair, thighs, knees, and buttock. The verbal conduct for which appellant was convicted included persistent complements on their hair, eyes, and physical appearance and questions about their weight, whether they were happily married, whether they had a boyfriend, if they had ever had an affair, and in the case of one nurse, what type of bathing suit she wore and if women masturbated. Additionally, he asked them for their home phone numbers and asked them out for dates. Some of the victims showed their displeasure with appellant's physical contact with them by moving away from the appellant, and one told the appellant that she did not like the way he touched her. Contrarily, none of the complainants made their disapproval of the appellant's verbal comments known to him or to anyone in their chain-of-command.
HOLDING: The CAAF ruled that the military judge did not abuse his discretion when he admitted the nonpunitive Air Force Pamphlet (AFP) 36-2705, Discrimination and Sexual Harassment (28 February 1995) over defense objection. In so ruling, the CAAF agreed with the military judge that the AFP was relevant to establish notice of the prohibited conduct and the applicable standard of conduct in the Air Force community to the appellant. Additionally, the CAAF stated that in cases were evidence of the custom of the service is needed to prove an element of an offense, it is likely that the probative value will out weigh the prejudicial effect. With regard to the sufficiency of the evidence, the CAAF focused on the fact that government relied on the AFP to establish the applicable standard of conduct. When considering the standards in the AFP, combined with the facts of the case, the CAAF concluded that the government had to show that: "(1) appellant's conduct was 'unwelcomed'; (2) it consisted of verbal

and physical conduct of a sexual nature and (3) it created an intimidating, hostile, or offensive work environment that was so severe or pervasive that a reasonable person would perceive that work environment as hostile or abusive, and the victim of the abuse perceived it as such." The CAAF went on to analyze the verbal comments and physical contact by the appellant separately. In finding the evidence legally insufficient to support appellant's convictions for the verbal comments, the CAAF noted that the record was clear that none of the victims ever informed the appellant that any of his remarks were unwelcome. While the AFP does not require a recipient of sexual remarks to tell the speaker that the remarks were unwelcome, the CAAF felt that a recipient's action or inaction in response to the remarks is relevant in determining whether the speech was unwelcome. The CAAF further noted from the record that the working atmosphere of the parties regularly accepted conversations involving physical appearance and sexual matters. This atmosphere cut against a finding that the appellant's comments created a work environment that was "hostile or abusive." However, the CAAF affirmed the convictions for the physical contact, concluding that it was not reasonable for the appellant "to assume that [the victims] would consent to physical contact of an intimate nature absent some communication of receptivity or consent."

United States v. Carson, 55 M.J. 656 (Army Ct.Crim.App. 2001). Appellant was convicted, contrary to his pleas, of maltreatment of subordinates (five specifications) and indecent exposure (three specifications). Appellant was the supervising desk sergeant in a military police station. There he repeatedly exposed his penis to three of his subordinate female MP soldiers. The appellant challenged the maltreatment conviction stemming from his conduct with one of the victims, stating that his conduct did not result in "physical or mental pain or suffering" by this alleged victim. The victim of the challenged conviction testified that she never asked appellant to see his penis, that she was bothered and shocked when he exposed himself, and that she considered herself a victim. In holding that proof that the victim suffered "physical or mental pain" was not required in order to support a conviction for maltreatment of a subordinate, the ACCA relied on the fact that neither the UCMJ nor the Manual of Courts-Martial contained this requirement. In making this determination, ACCA expressly overruled its earlier contrary holding in *United States v. Rutko*, 36 M.J. 798 (A.C.M.R. 1993).

United States v. Matthews, 55 M.J. 600 (C.G.Ct.Crim.App. 2001). Contrary to his pleas, appellant was convicted of attempted forcible sodomy, maltreatment by sexual harassment, indecent assault, and solicitation to commit sodomy. The charges arose from allegations of a subordinate female enlisted sailor who claimed that while she was on

TDY with the appellant, he sexually assaulted her and attempted to force her to perform oral sodomy on him while they were in his hotel room. Contrarily, the appellant testified that it was the alleged victim who had initiated the sexual interaction, that the sexual foreplay was mutual, and that he never used force on her. Evidence presented at trial established that the appellant had sixteen years on active duty and had amassed an outstanding record and reputation for devotion to duty and honesty. In sharp contrast, several witnesses stated that they had little or no confidence in the alleged victim's truthfulness or integrity, and that she was a poor duty performer. The service court felt that this case boiled down to a swearing contest between the two parties, therefore, the issue of each of their credibility was paramount. In overturning the appellant's convictions for attempted forcible sodomy, maltreatment by sexual harassment, and indecent assault, the court relied heavily on the disparate opinion and reputation testimony concerning the two involved parties. The majority gave little weight to the testimony of medical and psychiatric experts who treated the alleged victim and found her credible and her reaction to the assault consistent with post-traumatic stress disorder. The court noted that these experts had assumed the accuracy of the facts related by the alleged victim and also pointed to the defense forensic psychiatrist who was skeptical of the alleged victim's account of events. The majority was quick to point out that under the facts of the case, the appellant was guilty of violating the service's general regulation against fraternization, but that he was never charged with that crime.

United States v Goddard, 54 M.J. 736 (N.M.CtCrim.App. 2000). Contrary to his pleas, the appellant was convicted of maltreatment and fraternization in violation of Articles 93 and 134, UCMJ. The charges were the result of a one time consensual sexual encounter with his female subordinate on the floor of the detachment's administrative office. In setting aside the maltreatment conviction, the service court cited the CAAF's decision in *U.S. v. Fuller*, 54 M.J. 107 (2000), in which it concluded that, "a consensual sexual relationship between a superior and a subordinate, without more, would not support a conviction for the offense of maltreatment." The court did, however, approve the lesser-included offense of a simple disorder in violation of Article 134, UCMJ. The fact that the sexual encounter took place in the detachment's administrative office, that after the sexual encounter was over the appellant instructed the victim leave the office in a manner that ensured that other personnel would not see her, and that the victim lost respect for and avoided the appellant because she had been briefed that such relationships were improper, all led the court to conclude that appellant's conduct was prejudicial to good order and discipline.

United States v. Sanchez, 50 M.J. 506 (A.F.Ct.Crim.App. 1998). Accused cannot be convicted of both conduct unbecoming (Art. 133) and fraternization (Art. 134) when the misconduct alleged in the specifications is identical; fraternization gets dismissed. Those fraternization allegations not alleged in conduct unbecoming specifications remain. Court cites *United States v. Harwood*, 46 M.J. 26, 28 (1997) in support.

United States v. Hawes, 51 M.J. 258 (1999). CAAF affirmed Air Force Court's decision to set aside fraternization conviction and to reassess the appellant's sentence without ordering a rehearing. CAAF agreed that the fraternization offense was "relatively trivial" when compared to other misconduct.

United States v. Mann, 50 M.J. 689 (A.F.Ct.Crim.App. 1999). Sexual relationship is not a prerequisite for fraternization. Evidence was legally and factually sufficient to support conviction for fraternization. No interference with accused's access to witnesses where order prohibiting accused from contact with his fraternization partner did not prohibit accused's counsel from such contact. A.F. court finds no unlawful command influence or unlawfulness with the order.

United States v. Rogers, 54 M.J. 244 (2000). Evidence legally sufficient to sustain Art. 133 conviction for the offense of conduct unbecoming an officer by engaging in an unprofessional relationship with a subordinate officer in appellant's chain of command. AF Court holds there is no need to prove breach of custom or violation of punitive regulation.

VI. CONCLUSION.